

D.P.U. 91-DS-84

Adjudicatory hearing in the matter of a possible violation of General Laws, Chapter 82, Section 40, by Fiore Construction Company.

APPEARANCES: Michael Dyer, Project Manager
Fiore Construction Company
Rear 133 Nashua Street
Leominster, Massachusetts 01453
FOR: FIORE CONSTRUCTION COMPANY.
Respondent

Gail Soares, Dig-Safe Investigator
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On November 5, 1991, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Fiore Construction Company ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent blasted during excavation on October 10, 1991 at 1348 Main Street, Tewksbury, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The NOPV also stated that the Respondent failed to render proper notice and failed to exercise reasonable precautions, causing damage to an underground gas main operated by Colonial Gas Company ("Colonial Gas" or "Company"). The NOPV further stated that the Respondent had the right to either appear before a Division hearing officer in an informal conference on December 18, 1991, or send a written reply to the Division by that date.

On December 15, 1991, the Respondent met with the Division during an informal conference. In a letter dated January 22, 1992, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. On January 23, 1992, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on January 6, 1994 pursuant to the Department's procedures for enforcement of the Dig-Safe Law under 220 C.M.R. § 99.00 et seq.

At the hearing, Gail Soares, a Dig-Safe investigator, appeared on behalf of the Division. John Gatherum, a claims supervisor for Colonial Gas, and Robert Naper, a leakage control supervisor for the Company, testified in behalf of the Division. Michael Dyer, project manager for

Fiore Construction Company, testified for the Respondent. All exhibits offered were moved into evidence by the Department.

II. SUMMARY OF FACTS

A. The Division

The Division alleges that the Respondent failed to use reasonable precautions, and failed to render proper notification by failing to contact Dig Safe System, Incorporated ("Dig-Safe")¹ before blasting twice during excavation on October 10, 1991 at 1348 Main Street, Tewksbury, which resulted in damage to an underground gas main in both instances (Tr. at 8, 12-13, 46; Exhs. D-1, D-2).

In support of this allegation, the Division cited the relevant portion of the Dig-Safe Law, which states that when unanticipated blasting is required, excavators must still notify all utility companies with underground facilities in the town within which the excavation is taking place not less than four hours before such blasting is to take place (Tr. at 20). The Division elicited testimony from Mr. Gatherum in which he stated that although the Respondent had obtained Dig-Safe numbers for the area in question, no mention was made of blasting in any of those Dig-Safe requests (id. at 9-13; Exh. D-9). The Division's other witness, Mr. Naper, testified that although the Respondent made no mention of blasting in its Dig-Safe request, it did notify the Company at approximately 7:20 a.m. on the date the blasting occurred, 40 minutes before the scheduled blasting (Tr. at 14-15). Mr. Naper also testified that an unexposed cast-iron gas main was broken

¹ Dig-Safe is a non-profit organization that exists for the express purpose of gathering information on proposed excavations from excavators, and disseminating that information to utility companies so that they can properly mark their underground facilities before excavation begins. See G.L. c 164, § 76D.

as a direct result of the Respondent's first blast (id. at 15, 40). In addition, Mr. Naper contended that no Company employees were present at the site during the first blast by the Respondent (id. at 15).²

Mr. Naper stated that after the Company completed repairs necessitated by the Respondent's first blast, the Respondent asked the repair crew to remain at the site to witness a second blast scheduled to take place after "lunch" (id. at 16). Mr. Naper stated, however, that the Respondent blasted a second time while the Company's repair crew was at lunch, and further damaged the Company's cast-iron gas main (id.). He stated that if the Company had been properly notified of blasting, it could have attempted to protect its underground facilities by: (1) meeting with the Respondent to discuss the excavation and different blasting techniques designed to lessen the impact on facilities; and (2) temporarily relocating its gas main or taking it out of service, or replacing the cast-iron gas main with a plastic gas main that was more durable and could withstand more of the pressure associated with blasting (id. at 16-17). In addition, Mr. Naper stated that the cast-iron gas main that was twice damaged was in "good" condition and not scheduled for replacement before damage occurred (id. at 18, 40; Exh. D-10, D-11).³ Finally, Mr. Naper stated that blasting may not have been necessary in the Respondent's excavation (id. at 17).

² Mr. Naper testified that he had not visited the site in question, and did not have first-hand knowledge of whether Company personnel were at the site during either blast (Tr. at 15, 43). He stated that most of his knowledge of the circumstances regarding the incident came from Company records (id. at 43).

³ Mr. Naper stated that corrosion on cast-iron pipes does not affect the integrity of the line, because, unlike steel pipes, cast-iron pipes are designed to allow corrosion to "build up" on the outer surface of the pipe and not penetrate into the inner portion of the pipe (Tr. at 40-41).

B. The Respondent

Mr. Dyer testified that although he was not the "blaster" for the Respondent, he witnessed the Respondent's blasting, and was intermittently present at the site during the Respondent's excavation (id. at 34, 37). Mr. Dyer also testified that the Respondent was aware of the location of the gas main, and had purposely altered its excavation away from the gas main to avoid damage when it discovered ledge and realized that blasting was necessary (id. at 27-28). Mr. Dyer further testified that the Respondent was bound by time restraints to finish its project before November 15, 1991, when the Respondent's permits expired (id. at 28, 38). In addition, he testified that the Respondent had discovered the ledge at 6:00 p.m. on October 9, 1991, the night before the blasting took place, and did not re-notify the Company or Dig-Safe to report a potential blasting due to a worry concerning completing its project with the given time restraints (id. at 28, 33-34, 36). However, Mr. Dyer stated that the Respondent had notified the Company the following morning at 7:00 a.m., and also stated that Company personnel had arrived at 8:00 a.m., approximately 40 minutes before the first blast took place (id. at 28-30, 36-37).

Mr. Dyer stated that the Respondent had taken several precautions to avoid damage to the gas main during blasting, such as laying between two and three feet of gravel over the blast site, and using blast mats and steel plates (id. at 29). Mr. Dyer also stated that the Respondent's excavation did not expose the Company's gas main, which was between three and five feet away from the area of blasting (id.). He further testified that the Respondent's blast had only "grazed" the gas main, and had not interfered with the main directly (id. at 31). In addition, Mr. Dyer stated that the gas main that was damaged was a corroded cast-iron pipe that was approximately

50 years old, and maintained that the poor condition of the pipe had contributed to the ease with which the gas main was damaged (id. at 28, 35). Finally, Mr. Dyer stated that given the existing facts, he did not know of further precautions the Respondent could have taken to avoid damage to underground facilities (id. at 31, 47).

III. STANDARD OF REVIEW

In regard to proper notice for blasting, G.L. c. 82, § 40 also states in pertinent part:

initial notice shall indicate whether any such excavation will involve blasting and, if so, the date on which the specific location at which such blasting is to occur; provided, however, that in no event shall any excavation by blasting take place unless written notice thereof, either in the initial notice or a subsequent notice, accurately specifying the date and location of such blasting shall have been given and received at least twenty-four hours in advance, except in the case of an unanticipated obstruction requiring blasting when such notice should not be less than four hours in advance to such ... companies as supply gas, electricity, telephone or cable television services in or to the city or town where such excavation by blasting is to be made.

IV. ANALYSIS AND FINDINGS

The issue to be decided in this case is whether the excavator failed to provide proper notification before blasting.⁴

In addressing this issue, the Division alleged that the Respondent had ample time to provide proper notification to Dig-Safe, and that if properly notified, the Company could have helped the Respondent to avoid damage to underground facilities. The Division's witness supported this allegation by listing several methods that the Company could have taken to have

⁴ Although the Division also alleged that the Respondent failed to use reasonable precautions during excavation (Tr. at 4, 46), it did not present adequate support or evidence to demonstrate that proper precautions were not taken by the Respondent. Accordingly, the Department will not address this issue.

helped the Respondent avoid damage if given proper notice.

The Respondent testified that it was under time constraints to finish the project, and that these constraints prevented it from properly notifying the Company or Dig-Safe. However, witnesses for the Respondent testified that it was aware of a need for blasting after discovering ledge at 6:00 p.m. on the evening before it blasted the following day, and the Respondent did not refute the Division's contention that the Respondent could have contacted either Dig-Safe or the Company before the required four-hour period preceding the blast. In cases of unanticipated blasting, the Dig-Safe Law states that all utility companies with underground facilities in the area of the proposed excavation must be noticed by excavators with a waiting period of only four hours before preceding with blasting, as opposed to the normal 72-hour waiting period for routine excavations. See G.L. c. 82, § 40. Had the Respondent contacted Dig-Safe or the Company directly after discovering ledge and a need for blasting at 6:00 p.m. on October 9, 1991, instead of waiting until the next day, approximately 40 minutes before blasting, the Dig-Safe Law's notice requirement would have been met. The Respondent was aware of a need for blasting approximately ten hours before doing blasting occurred, and therefore had ample time to properly notify the Company.

In a related case, the Department found that conditions on an unanticipated blasting site warranted the granting of an exception to the Dig-Safe requirement to wait four hours after proper notification to start blasting. See Fiore & Zenone, Inc., D.P.U. 88-DS-10 (1993). In that case, the facility that was damaged had been exposed prior to any blasting, and the gas company, which was the only utility company with facilities in the area of blasting, was notified by the

Respondent immediately upon its discovery of unanticipated ledge, and representatives of the gas company were present for the blasting. In the instant case, the damaged facility was not exposed and its exact location was not known, and the excavator was aware that blasting would be necessary at approximately 6:00 p.m. on the evening prior to the blast that was performed the following morning at approximately 8:30 a.m. The Respondent had ample time during which to provide proper notice to the Company. In addition, there were at least two types of underground facilities in the area of excavation.⁵

Accordingly, the Department finds that the Respondent failed to tender proper notification when it did not contact Dig-Safe or the Company at least four hours before blasting at approximately 8:40 a.m. on October 10, 1991 at 1348 Main Street, Tewksbury, Massachusetts, and therefore, violated the Dig-Safe Law.

V. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Fiore Construction Company violated the Dig-Safe Law at approximately 8:40 a.m. on October 10, 1991 during excavation at 1348 Main Street, Tewksbury; and it is

⁵ The Dig-Safe Law requires that notice of blasting be provided to companies that supply gas, electricity, telephone, or cable television service in or to the city or town via underground facilities where such excavation by blasting is to be made. The Department recommends that all excavators call Dig-Safe before making an excavation of any kind. See G.L. c. 164, § 76D. Calling Dig-Safe is equivalent to written notification to all companies with underground facilities in the area to be excavated. See G.L. c. 82, § 40; Fiore & Zenone, D.P.U. 88-DS-10 (1993); Heavey Construction and Management Co., D.P.U. 90-DS-3 at 6 (1991); Amendment of Dig-Safe Regulations, D.P.U. 88-40 at 1 (1991).

ORDERED: That Fiore Construction Company, being a repeat violator of the Dig-Safe Law, shall pay a civil penalty of \$500 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this order.

By Order of the Department,